UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, d/b/a PACIFIC BEACH HOTEL and		CASES	37-CA-7311 37-CA-7334 37-CA-7422 37-CA-7448 37-CA-7458 37-CA-7476 37-CA-7478 37-CA-7484 37-CA-7484 37-CA-7537 37-CA-7537
HTH CORPORATION d/b/a PACIFIC BEACH HOTEL,)		
and))	CASE	37-CA-7470
KOA MANAGEMENT, LLC d/b/a PACIFIC BEACH HOTEL)		
and))	CASE	37-CA-7472
PACIFIC BEACH CORPORATION d/b/a PACIFIC BEACH HOTEL)))		
and)	CASE	37-CA-7473
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142)))		

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142's BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

CERTIFICATE OF SERVICE

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TABLE OF CONTENTS

		<u>Page</u>
I.	PRELIMINARY STATEMENT	1
II.	ILWU'S EXCEPTION TO JUDGE'S REMEDIAL ORDER	6
III.	CONCLUSION	12

TABLE OF AUTHORITIES

CASES

Adair Standish Corp., 290 NLRB 317 (1988)	9
<u>Clements Wire</u> , 257 NLRB 1058 (1981)	10
F. W. Woolworth Co., 90 NLRB 289 (1950)	11, 12
Fiberboard Corp. v. NLRB, 379 U.S. 203 (1964)	9
First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981)	8
Kajima Engineering & Construction, Inc., 331 NLRB 1604 (2000)	9
Long Beach Press Telegram, 354 NLRB No. 4 (2009)	9, 11
New Horizons for the Retarded, 283 NLRB 1173 (1987)	12
Pacific Beach Corp., 344 NLRB 1160 (2005)	4
Pacific Beach Hotel, 342 NLRB 372 (2004)	4
Pan-American Grain Co., 351 NLRB 1412 (2007)	8, 9
Robertshaw Controls Co., 161 NLRB 103 (1966)	10
Toma Metals, Inc., 342 NLRB 787 (2004)	10, 11
STATUTES	
29 U.S.C. Section 151 et seq.	2

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142's BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

I. PRELIMINARY STATEMENT

On August 15, 2005, the International Longshore and Warehouse Union, Local 142, AFL-CIO (hereinafter "Charging Party" or "ILWU" or "Union") was certified as the exclusive collective bargaining representative for the following employees of Respondent HTH Corporation d/b/a Pacific Beach Hotel in a Unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time and regular on-call concierge, concierge II, night auditor, guest service agent I, guest service II, room control clerk, bell help, bell sergeant, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper IB, housekeeper II, housekeeper III, laundry attendant I, seamstress, bus help, host help, wait help, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet food runner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior cost control clerk, food and beverage cashier, network support specialist, diver level II, diver level III, diver level III, diver level IV, PBX operator, lead operator, maintenance 2nd, maintenance 1St, mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed by the Employer at the Pacific Beach Hotel, located at 2490 Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marketing (sic), director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop Manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant

managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

(See GC Exh.1 (ssss), also, Consol. Comp., ¶ 6a, ¶6b).

The Consolidated Complaint (GC Exh.1 (ffff) identifies a total of sixteen (16) unfair labor practice (ULP) charges filed by the ILWU alleging that Respondents HTH Corporation, Pacific Beach Corporation, and Koa Management, LLC, a single employer, d/b/a, Pacific Beach Hotel had violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the "Act"). Each and every ULP charge and amended ULP charge were properly served by first-class mail on Respondents. (See General Counsel Exhibits 1(a)-1 (eeee)).

The Regional Director for Region 20 issued a Consolidated Complaint and Notice of Hearing against the Respondents on August 29, 2008. (GC Exh. 1(ffff)); an Amended Consolidated Complaint was issued on September 30, 2008. (GC Exh. 1(iiii)) and on December 15, 2008, Counsel for the General Counsel moved to amend the Amended Consolidated Complaint (GC Exh. 1(ssss)).

The Amended Consolidated Complaint alleges as first and second alternative legal theories (¶2-23) that the entity described as Respondents HTH has been the continuous employer of bargaining unit employees at the Pacific Beach Hotel including as a joint employer from January 1, 2007 through November 30, 2007 with PBH MANAGEMENT, LLC (hereinafter "PBHM") (¶2(a-n)) or, in the alternative, based on a principal-agent relationship (¶2(m)(ii) with PBHM. (See GC Exh. 1(ssss)). General Counsel's third alternative legal theory (¶24-41) alleges that the entity described as Respondent HTH is a successor employer (¶24(a)-24(n)) to PBHM. (Id.).

The Amended Consolidated Complaint further alleges that:

- Ouring the month of January 2006 to December 2006, Respondent failed and refused to bargain in good faith with the Union (See ¶7(a)-7(c); ¶29(a)-29(c));
- (2) On April 17, 2007 and May 30, 2007, and again on September 11, 2007 and October 11, 2007, Respondent failed to furnish the Union with information relevant to the Union's performance of its duties as the

- exclusive collective bargaining representative (See $\P8(a)-8(d)$ & $\P9(a)-9(c)$);
- On August 2, 2007, Respondent refused to bargain in good faith with the Union by first refusing PBHM's request to consent to a collective bargaining agreement with the Union and then on August 3, 2007 notified PBHM that Respondent would terminate the Management Agreement and later on November 30, 2007, terminated the Management Agreement (See ¶10(a)-10(d));
- (4) On September through November 30 2007, and continuing to December 1, 2007, Respondent unilaterally implemented without bargaining with the Union, an application process requiring employees to submit applications; required employees to undergo and pass drug testing as a term and condition of employment; permanently terminated certain employees; implemented a 90-day introductory period for its employees and engaged in conduct which denied the Union an opportunity to bargain on mandatory subjects relating to wages, hours and other terms and conditions of employment (See ¶11(a),(b),(d),(e)-11(f));
- (5) On or about November 30, 2007, Respondents HTH permanently terminated certain of the Unit employees whose names are not known with certainty by the General Counsel, but who are known to respondents HTH(See ¶ 11c);
- (5) On December 1, 2007, Respondent hired certain employees and unilaterally implemented a wage scale at an hourly wage lower than the hourly wages received from PBHM for certain employees (See ¶11(g));
- (6) On September 20, 2007, Respondent by counting employees, engaged in the surveillance of employees engaged in Union and other concerted activities (See ¶12 & ¶30);
- (7) On November 30, 2007, Respondent unlawfully discharged seven (7) bargaining unit employees who are members of the union negotiating committee thereby discouraging membership in a labor organization (See ¶13(a)-13(b); ¶31(a)-31(b); & ¶38);
- (8) From August 27, 2007, including December 3, 2007, and from December 1, 2007, Respondent failed to recognize and bargain collectively with the Union (See ¶14(a)-14(b); ¶32(a)-32(b));
- (9) Respondent unilaterally promulgated and maintained overly broad and discriminatory rules that discourage employees from assisting the Union or engaging in other protected activities (i.e., prohibit employees from

talking to union representatives) (See $\P15(a)-15(d)$ & $\P33(a)-33(b)$ "Conflict of Interest;" $\P16(a)-16-(c)$ & $\P34$ "Confidentiality Statement");

- (10) Respondent unilaterally implemented wage increases for housekeepers, banquet stewards, tipping category employees; and unilaterally increased the number of rooms to be cleaned by a housekeepers, without prior notice to the Union and without affording the Union the opportunity to bargain with respect to wages, hours and other terms and conditions of employment (See ¶17(a)-17(g));
- (11) Respondent maintained facially unlawful rules and policies in the employee handbook that interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of Act and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. (i.e., the right effectively to communicate with one another regarding self-organization at the jobsite.) and/or Respondent maintained various work rules and policies in the employee handbook that would reasonably tend to chill employees in the exercise of their Section 7 rights. (See ¶18(1)-¶18(11); & ¶35(1)-¶35(11));
- (12) On April 23, 2008, and again on April 25, 2008, Respondent polled employees about their Union sentiments concerning the Union and/or Union activities, which interfered, restrained, and coerced employees in their exercise of rights guaranteed in Section 7 of the Act

(See
$$\$19(a)-19(b)$$
; & $\$36(a)-36(b)$).

At the start of the November 4, 2008 hearing, and further discussed throughout the hearing, the parties stipulated to various Joint Exhibits (See Joint Exhs. "A"-"E" (E-1 to E-6). The parties further stipulated that at all material times, the Union has been a labor organization within the meaning of Section 2 (5) of the Act and agreed that:

- on April 26, 2002, the union filed a representation petition with the NLRB to represent employees at Pacific Beach Hotel in Case 37-RC-4022;
- (2) a Decision and Direction of Election in Case 37-RC-4022 was issued on July 2, 2002;
- (3) the Board issued decisions in <u>Pacific Beach Hotel</u>, 342 NLRB 342 (2004), and <u>Pacific Beach Corp.</u>, 344 NLRB 1160 (2005) in Case 37-RC-4022; and
- (4) on August 15, 2005, the Union was certified as a representative of employees in the appropriate bargaining unit at the Pacific Beach Hotel.

Additionally, the parties stipulated that in the initial negotiations the Respondent and the Union met for purposes of collective bargaining on the following dates:

November 29, 2005; January 5, 13 and 19, 2006; February 9 and 16, 2006; March 2 and 16, 2006; April 13, 19 and 27, 2006; May 11, 25 and 30, 2006; June 6, 9 and 29, 2006; July 7, 13 and 27, 2006; August 3, 10, 17, 21 and 31, 2006; September 7, 14 and 21, 2006; October 5, 12 and 19, 2006; November 2, 9, 16 and 20, 2006; December 7 and 14, 2006.

The parties also stipulated that the Union's Chief Spokesperson Dave Mori and Respondent's Chief Spokesperson Robert Minicola were present at each of these sessions, except that Dave Mori was absent from the May 25, 2006 session, and Robert Minicola was absent from the April 13, 2006 session. (See GC Exh. 3 "Stipulations And Exhibits").

On September 30, 2009, Administrative Law Judge James Kennedy (hereinafter "judge") issued his Decision, and, as discussed in detail in the ILWU's Answering Brief To Respondent's Exceptions to Administrative Law Judge Decision filed on October 28, 2009, the judge properly found for the General Counsel on nearly every allegation contained in the complaint. However, the judge failed to include in his Order for remedies, what the ILWU believes should have been included in his Decision: an order of back pay and reinstatement to substantially equivalent positions, and other make whole provision for those Shogun workers unlawfully terminated/laid off by Respondents, and for those reasons, takes this limited exception to this portion of the judge's Decision.

¹ For a thorough discussion on the judge's findings of fact and conclusions of law, see ILWU's Answering Brief to Respondent's Exceptions To the Administrative Law Judge's Decision

II. <u>ILWU'S EXCEPTION TO JUDGE'S REMEDIAL ORDER</u>

Exception 1: This exception relates to the judge's failure to include in his Order for remedies, an Order 1) to remove reference to the termination/layoff in the employment file of each of the Shogun Restaurant employees laid off/terminated and not rehired on December 1, 2007, and 2) to offer full reinstatement to his or her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or any other rights or privileges previously enjoyed. Also, the ILWU excepts to the judge's failure to include a cease and desist Order, a bargaining Order and an Order for a make whole remedy for any loss of earnings and other benefits to those Shogun employees as a result of Respondents' unlawful conduct.

The Complaint alleges that Respondents violated Sections 8(a) (1) and (5) of the Act when, "[o]n or about November 30, 2007 Respondents permanently terminated certain of the Unit employees whose names are not known with certainty by the General Counsel, but who are known to Respondents." (See GC Exh. 1(ssss) ¶11(c); GC Exh. 1rrrr ¶13(c),(e),(f);¶19,¶21). In his Findings of Fact, the judge found that "Respondents also discharged (through PBHM) all of the then current employees since it had also instituted the application process, it also offered employment to substantially fewer employees."(Decision, 23: 12-14). In his Conclusions of Law, the judge concluded that "[o]n December 1, 2007 Respondents unilaterally and without bargaining with the Union closed the Shogun Restaurant and released an undetermined number of employees who worked in that restaurant, in violation of §8(a)(5) and (1) of the Act." (Decision, 44:15-17). However, in his Order the judge failed to include in the Order a requirement that Respondents reinstate those individuals and/or make whole those employees

who worked in the Shogun Restaurant at the time of closure and who were not rehired to begin work for the Pacific Beach Hotel on December 1, 2007.

At the hearing, Respondents offered into the record, a list of thirty-four (34) bargaining unit employees working at the Pacific Beach Hotel through November 30, 2007, who were not offered employment on December 1, 2007. (Respondents Exh 18). Found on that list were eleven (11) bargaining unit employees working in the Shogun restaurant listed as follows:

30. K	ominador A. Romero win S. Arcalas edorico E. Ballesteros esario O. Cajalne eizo Mizogughi oichi Tada	Waithelp Cook II (Kitchen)
30. K 31. D 32. A	~ ~ ~	. ,

Also, it is undisputed that on December 3, 2007 Minicola informed Union President Fred Galdones that Respondents was not recognizing the Union and there would be no bargaining. (Tr. 576-577). Galdones then sent a December 4, 2007 letter to Minicola confirming the conversation that Respondents was not recognizing the Union and would not engage in collective bargaining. (GC Exh. 47). Respondents confirm these facts in its Brief in Support of Exceptions to Administrative Law Judge's Decision ("BSE"), by arguing that they had no obligation to bargain with the Union since it was not the employer of the bargaining unit employees on January 1 through November 30, 2007. (BSE at 28). However, the judge properly found that Respondents were the continuous "true employer" of the employees employed by the Pacific Beach Hotel. (Decision, 16; 19-20). Consequently, the judge concluded that "[a]]though between January 1, 2007 and December 1, 2007 Respondents contractually delegated PBHM to

run the Hotel and to bargain collectively with the Union on Respondent's behalf, at no time were Respondents relieved of the obligation to bargain collectively in good faith with the Union. (Decision, 43:29-32, ¶8).

After terminating the Management Agreement (GC Exh.38) and causing PBHM to terminate all of the bargaining unit employees, Respondents determined that certain employees would not be hired as of December 1, 2007. (Resp.Exh.18). Minicola testified that the closure of the Shogun Restaurant was due to reduced hotel occupancy forecasts and forecasted reduction in customer traffic within the hotel. (Tr.2138-2142, 2160-2162). Under these circumstances, Respondents had a duty to bargain with the Union over an economically motivated decision to close the Shogun restaurant and/or the effects of the termination of Shogun restaurant employees. See First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). Further, Respondents were under a mandatory obligation to have given prior notice to and have afforded the Union an opportunity to bargain regarding the December 1, 2007 termination/layoff and re-hire decisions, since First National Maintenance Corp is controlling.

Restaurant employees. By failing to bargain with the union on the order of layoffs, a reinstatement remedy is appropriate under the <u>First National Maintenance Corp</u> second category management decisions, such as "the order of succession for layoffs and recalls," which are "almost exclusively 'an aspect of the relationship' between employer and employee" are mandatory subjects of bargaining. 452 U.S. at 677.

Under these circumstances, Respondent's decisions concerning the selection of which of the Shogun Restaurant employees to terminate/layoff and not to rehire due to economic reasons are mandatory subjects of bargaining. Pan-American Grain Co., 351 NLRB 1412

(2007); Kajima Engineering & Construction, Inc., 331 NLRB 1604, 1618-20 (2000). See, e.g., Adair Standish Corp., 290 NLRB 317, 319 (1988) (finding unlawful failure to bargain over economically motivated layoffs); enfd. in relevant part, 912 F.2d 854 (6th Cir.1990); See also, Fiberboard Corp. v. NLRB, 379 U.S. 203, 213-214 (1964) (stating that measures aimed at reducing labor costs are "matters particularly suitable for resolution within the collective bargaining framework").

In the present situation, given the judge's failure to impose a proper remedy, the Union is requesting that the Board Order a requirement that Respondents "reinstate" those individuals and/or "make whole" those employees who worked in the Shogun Restaurant at the time of closure and who were not rehired to begin work for the Pacific Beach Hotel on December 1, 2007. A reinstatement order is appropriate since it is undisputed that Respondents had failed to bargain with the Union over order of succession for the layoffs of the Shogun employees prior to December 1, 2007. (Decision, 44:15-17). In Pan-American Grain Co., 351 NLRB 1412 (2007), the Board affirmed the ALJ's finding that respondent's decision to layoff 15 employees was a mandatory subject of bargaining, that the respondent violated §8(a) (5) and (1) of the Act. by implementing the layoffs, without giving adequate notice and a reasonable opportunity to bargain. In Pan-American Grain Co., supra, the remedy ordered by the Board included inter alia, an Order that respondents offer each of the employees laid off, full reinstatement to his or her former job or, if that job to longer exist, to a substantially equivalent position, without prejudice to his or her seniority or any of the rights or privileges previously enjoyed. 351 NLRB at 1415. (Emphasis added.). In Long Beach Press Telegram, 354 NLRB No. 4 (2009), the Board issued a similar "full reinstatement" Order upon the finding that respondent violated §8(a)(5) and (1) of the Act by failing to bargain with the union by reducing

its workforce, including eliminating departments and job positions, which resulted in the layoffs of respondents employees without prior notice to the union and without affording the union an opportunity to bargain with respect to the conduct and the effects of this conduct.

Also, a reinstatement order is appropriate since it is undisputed that Respondents had failed to bargain with the Union over the recall rights of the Shogun employees prior to December 1, 2007. (Decision, 44:15-17). "[T]he recall of laid-off employees is . . . a bargainable matter." Toma Metals, Inc., 342 NLRB 787 (2004); Robertshaw Controls Co., 161 NLRB 103, 108(1966), enfd. 386 F.2d 377 (4th Cir.1967). See also, Clements Wire, 257 NLRB 1058, 1059 (1981) (obligation to bargain over layoff includes duty to bargain over effects of layoff, including "manner in which any recalls are to be effected"). In Toma Metals, Inc., 342 NLRB 787 (2004), a panel majority of the Board (Members Liebman and Schaumber) adopted the judge's findings that the respondent violated §8(a)(5) and (1) of the Act by recalling laid-off employees without providing the union adequate notice and opportunity to bargain about the recalls. 342 NLRB at 787. Finding that layoffs and the recall of employees were linked, and that respondent gave the union advanced notice of neither, the remedial Order included, inter alia "full reinstatement" to his or her former job or, if that job to longer exist, to a substantially equivalent position, without prejudice to his or her seniority or any of the rights or privileges previously enjoyed. 342 NLRB at 791.

Clearly, in his Conclusion of Law, the judge determined that Respondents' failure to bargain with the Union over the effects of its decision to close the Shogun Restaurant effective December 1, 2007 to be "in violation of §8(a)(5) and (1) of the Act." (Decision, 44:15-17). Respondents made an economic decision to terminate/layoff eleven (11) employees who had worked in Shogun Restaurant and were not re-hired on December 1, 2007. It is undisputed that

Respondents did not bargain with the Union over the order of succession of layoff and of which Shogun Restaurant employees it would recall, effective December 1, 2007. Accordingly, the judge correctly concluded that Respondents violated §8(a)(5) and (1) of the Act by failing to provide the Union with adequate notice and an opportunity to bargain over the economic decision to terminate/layoff, the order of layoff, and the decision not to re-hire/recall the eleven (11) Shogun Restaurant employees. Finding these violations, the judge failed to provide the proper remedial order.

Under the circumstances, the remedy for the eleven (11) Shogun restaurant employees is an Order to cease and desist from terminating/ laying off Shogun employees without first giving adequate notice of its intention to do so to the Union and affording the Union an opportunity to bargain in good faith over the termination/layoff decision and its effects. On request, bargain with the Union concerning the decision to terminate/ layoff Shogun employees on December 1, 2007, and the effects of that decision. An Order for a make whole the remedy that each employee is entitled to full back pay and to remove reference to the termination/layoff of each of the Shogun employees laid off/terminated and not rehired on December 1, 2007, an offer for full reinstatement² to his or her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or any other rights or privileges previously enjoyed.³ The back pay award should be calculated in accordance with <u>F.</u>

² <u>See, e.g., Long Beach Press Telegram</u>, 354 NLRB No. 4 (2009); <u>Pan American Grain Co.</u>, 351 NLRB 1412, 1414-15, fn 11 (2007); <u>Toma Metals, Inc.</u>, 342 NLRB 787, 791 (2004)

³ See, Decision, 46:12-18 ¶2d and 46:20-24 ¶2e – remedial order by judge:

⁽d) Within 14 days from the date of this Order, offer Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villaneuva, Virginia Recaido, Ruben Bumanglag and Virbina Revamonte full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions displacing, if necessary, any more junior employees, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them

W. Woolworth Co., 90 NLRB 289 (1950), with interest as prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

III. CONCLUSION

For all of the aforementioned reasons, the ILWU respectfully requests that the Board find for the Union in the limited exception to the judge's failure to impose the remedial order requested above.

DATED: Honolulu, Hawaii, December 9, 2009.

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Attorneys for Charging Party International Longshore And Warehouse Union, Local 142

whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

⁽e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Keith Kapanena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villaneuva, Virginia Recaido, Ruben Bumanglag and Virbina Revamonte and within 3 days thereafter notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing document was duly served upon the following person by electronic filing and by depositing in the U.S. Mail, postage pre-paid on December 9, 2009:

Mr. Thomas Cestare, Officer in Charge Dale Yashiki, Counsel for General Counsel Trent Kakuda, Counsel for General Counsel National Labor Relations Board Subregion 37 300 Ala Moana Boulevard, Suite 7-245 Honolulu, Hawaii 96850

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DATED: Honolulu, Hawaii, December 9, 2009,

DANNY J. VASCONCELLOS HERBERT R. TAKAHASHI REBECCA L. COVERT Attorneys for Charging Party International Longshore And Warehouse Union, Local 142